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Can Global Legal Pluralism Be Both "Global" and "Pluralist"?

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CAN GLOBAL LEGAL PLURALISM BE BOTH “GLOBAL” AND “PLURALIST”?

PAUL SCHIFF BERMAN*

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INTRODUCTION

As a scholarly project, global legal pluralism has been extraordinarily successful, and it is not hard to see why. Legal pluralists had long observed that, in any given social context, people are regulated by multiple different legal and quasi-legal regimes and that these regimes are sometimes associated with formal state law, but sometimes they are not.¹ Global legal pluralism took that insight and applied it to the post-Cold War international and transnational arena at just the right moment. Circa 1998, international and transnational institutions were proliferating, industry standard-setting bodies and corporate codes of conduct were taking on new prominence, and the rise of online interaction meant that social life was increasingly deterritorialized and that almost any piece of electronic data or any online interaction could implicate multiple regulatory regimes.² As pluralists had long noted, this complex web of regulatory bodies included some regimes that were state-based, some that were built and maintained by non-state actors, some that fell within the purview of local authorities and

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* Walter S. Cox Professor of Law, The George Washington University Law School. An earlier version of this Essay was delivered as part of a symposium at Queen Mary University of London. I am grateful to Maks Del Mar for inviting me to participate in the symposium.

1. For a discussion of the emergence of Global Legal Pluralism from earlier Legal Pluralism scholarship, see Paul Schiff Berman, *The New Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 225 (2009).

2. See, e.g., Paul Schiff Berman, *Legal Jurisdiction and the Deterritorialization of Social Life*, in RESEARCH HANDBOOK ON THE LAW OF VIRTUAL AND AUGMENTED REALITY (Woodrow Barfield & Marc Jonathan Blitz eds., 2019).

jurisdictional entities, and some that involved international courts, tribunals, arbitral bodies, and regulatory organizations.³

Global legal pluralism provided scholars with a theoretical lens for conceptualizing the complex interactions among these various legal and quasi-legal entities. Most importantly, the pluralist perspective allowed theorists to extricate themselves from intractable and largely fruitless debates about what should count as law and what should not. For example, many international relations theorists, as well as scholars influenced by game theory and other formalist models of power, argued that international law was not truly law, given the absence of coercive enforcement.⁴ Likewise, those focused only on official law-making bodies tended to miss the potent power of non-state law-making, such as industry-specific regulatory entities or standard-setting organizations.⁵ Meanwhile, networks of NGOs promulgating rules, standards, ratings, transparency metrics and the like often wielded important influence that was often missed by those only willing to look at state-based law.⁶ And corporations, particularly online platforms such as Facebook, Google, Microsoft, and Apple, increasingly deployed the tools of transnational legal enforcement more effectively than territorially-bounded nation-states.⁷

3. For a more detailed discussion of this context, see PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* (2012).

4. See, e.g., EDWARD HALLETT CARR, *THE TWENTY YEARS' CRISIS, 1919–1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* 85–88 (1964) (rejecting internationalism/cosmopolitanism and stating that the principles commonly invoked in international politics were “unconscious reflexions of national policy based on a particular interpretation of national interest at a particular time”); JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2006) (using game theory and rational choice modeling in an effort to show that international law has no independent valence); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 5 (5th ed. 1973) (1948) (noting that the “main signpost that helps political realism to find its way through the landscape of international politics is the concept of interest defined in terms of power”); KENNETH N. WALZ, *THEORY OF INTERNATIONAL POLITICS* 122 (1979) (arguing that “although states may be disposed to react to international constraints and incentives,” they do so only if such actions conform with the state’s internal interests); Robert H. Bork, *The Limits of “International Law”*, NAT’L INT., Winter 1989–1990, at 3 (arguing against the importance of international law); Francis A. Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics*, 10 CAL W. INT’L L.J. 193, 201 (1980) (arguing that World War II itself made clear that states cannot rely solely on international law to protect their interests).

5. See, e.g., Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT’L L. 125 (2005).

6. See, e.g., SALLY ENGLE MERRY, *THE SEDUCTIONS OF QUANTIFICATION: MEASURING HUMAN RIGHTS, GENDER VIOLENCE, AND SEX TRAFFICKING* (2016).

7. See, e.g., Jennifer Daskal, *Borders and Bits*, 71 VAND. L. REV. 179 (2018); see also Paul Schiff Berman, *Legal Jurisdiction and the Deterritorialization of Data*, 71 VAND. L. REV. 11 (2018), <https://perma.cc/78ZY-8LYJ>.

Global legal pluralism applied the insights of socio-legal scholarship and turned its gaze away from abstract questions of legitimacy and towards empirical questions of efficacy. Thus, pluralists de-emphasized the supposed distinctions between a norm, a custom, a law, a moral command, a sociological consensus, a psychological imperative, or the like. Instead, a pluralist approach focused on both enacted law and what has sometimes been called “implicit” or “interactional” law, the purposive practices that groups of people enter into that impact their practical sense of binding obligation.⁸ In addition, pluralists recognized that both enacted and interactional legal norms tend to seep into consciousness over time, such that the mere existence of these commands, whether enforced or not, may sometimes alter the power dynamics or options placed on the table in policy discussions. Of course, questions of legitimacy and efficacy are inextricably linked, but pluralists argued that once we come to recognize multiple sources of transnational and non-state authority, it is difficult to maintain any single abstract conception of legal authority. At best, authority is always relative and always contested, and our models for describing law should reflect that pluralism.⁹

Global legal pluralism also allowed scholars to emphasize the constant *interaction* among these legal and quasi-legal systems. If authority and jurisdiction are never absolute but are instead always relative and contested, then we need to study that contestation, see how regulatory norms seep across territorial borders, analyze networks of influence, and try to tease out changes in legal consciousness over time: the often unnoticed and subtle changes in people’s taken-for-granted sense of the way things are or have to be.¹⁰ Significantly, these changes in legal consciousness can be influenced by norms that are articulated even without coercive power behind them.

8. See WIBREN VAN DER BURG, *THE DYNAMICS OF LAW AND MORALITY: A PLURALIST ACCOUNT OF LEGAL INTERACTIONISM* 98–105 (2014) (drawing on theorist Lon Fuller to develop a theory of interactional law).

9. See NICOLE ROUGHAN, *AUTHORITIES: CONFLICTS, COOPERATION, AND TRANSNATIONAL LEGAL THEORY* (2013).

10. See, e.g., KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY* 30–32 (1988) (examining “the role of legal ideology in structuring mass consciousness”); PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 45 (1998) (defining “legal consciousness” and arguing that “every time a person interprets some event in terms of legal concepts or terminology—whether to applaud or to criticize, whether to appropriate or to resist—legality is produced” and “repeated invocation of the law sustains its capacity to comprise social relations”); MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 7 (1994) (“*Legal (or rights) consciousness* . . . refers to the ongoing, dynamic process of constructing one’s understanding of, and relationship to, the social world through use of legal conventions and discourses.”); SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* 5 (1990) (arguing that “[l]egal consciousness is expressed by the act of going to court as well as by talk about rights and entitlements” and that such “[c]onsciousness develops through individual

Finally, moving from the descriptive to the normative, communities drawing on the insights of global legal pluralism might sometimes affirmatively seek to create or preserve spaces for productive interaction among multiple, overlapping communities and legal systems by developing procedural mechanisms, institutions, and practices that aim to bring those communities and systems into dialogue rather than dictating norms hierarchically. Such an approach is not derived from any overarching universal set of substantive truths and does not require a commitment to particular substantive values. They only require a pragmatic willingness to engage with other possible normative systems and potentially to restrain one's own voice for the sake of forging more workable, longer-lasting relationships and harmony among multiple communities. Thus, global legal pluralism provided a useful framework for both designing and evaluating legal institutions and procedures, separate from their substantive aims.

In short, during the past two decades, a rich body of work has established pluralism as an important descriptive and normative framework for understanding a world of overlapping jurisdictional assertions, both state and non-state. During that time, there has been a veritable explosion of scholarly work on legal pluralism, soft law, global constitutionalism, the relationships among relative authorities, and the fragmentation and reinforcement of territorial boundaries.

However, the very concept of global legal pluralism seems to contain a conundrum at its core. How can any theory of law be focused on pluralism and multiplicity and at the same time claim to be a "global" theory? This conundrum may explain in large part the criticism global legal pluralism receives from committed pluralists on the one hand and from committed international law triumphalists on the other. The pluralists argue that the *normative* side of global legal pluralism, by emphasizing procedures and institutions that foster dialogue and interaction, is essentially recapitulating a universalist liberal legality and therefore is not fundamentally pluralist at all. The triumphalists, in contrast, worry that the *descriptive* account of law that global legal pluralism provides will undermine hard-won international law norms and institutions or rob those norms and institutions of distinctive authority as hierarchically superior law.

My response, perhaps, is simply to plead "guilty" to both counts. But of course there is more to it than that, and so it might be useful to play out these arguments and responses in more detail. Accordingly, in what follows I explore this conundrum, using Hans Lindahl's sprawling and provocative

experiences"); Susan S. Silbey, *Making a Place for Cultural Analyses of Law*, 17 L. & SOC. INQUIRY 39, 42 (1992) (noting that "law contributes to the articulation of meanings and values of daily life").

work of global legal pluralism, *Authority and the Globalisation of Inclusion and Exclusion*,¹¹ as a jumping-off point. In particular, I will draw on two arguments that are at the core of Lindahl’s work.

First, and relevant to the pluralist objection, Lindahl observes that there is no way to conceptualize a normative legal order, even of the most inclusive sort, that does not somehow exclude as well as include, because there will always be some who resist and refuse to recognize that order.¹² Thus, according to Lindahl, it is impossible to offer any normative account of law, no matter how deferential to pluralism, that will not effectively eliminate some of the pluralism by creating boundaries between what is included and what is excluded. Lindahl’s discussion makes clear that even a purported pluralist approach that rejects a globally uniform set of rules may nevertheless still be a fundamentally universalist approach that is ineradicably and inevitably always in tension with pluralism itself. Indeed, there may be no way out of this conundrum if one wants to posit any sort of normative account of how law or legal institutions ought to be conceptualized.

Second, and relevant to the international law objection, Lindahl offers what he calls the IACA model of law, which he defines as “institutionalised and authoritatively mediated collective action.”¹³ This broad definition of law echoes the core insight of legal pluralism: not all that is law or law-like emanates from formal, state-based sources. Lindahl’s approach allows us to speak of emergent global legal orders, whether from above or below. But because it is a descriptive account based on empirical facts on the ground, it robs formal international law of its own asserted superior position. Indeed, this is in some ways a corollary of the point that there is no legal order that includes without excluding. There will always be those who resist: those who see themselves as excluded from a legal order, or those who refuse to be included in that order. These resisters may well create their own emergent legal order. And from the subject position of these resisters, the purportedly global legal order that aims to include them may be deemed illegitimate. Thus, as a fundamental matter, pluralism recognizes that there is no way to sit outside the world and, from an Archimedian point, declare that some law is universally legitimate and some law is not. Rather, the legitimacy or lack of legitimacy of law is always a political argument and a sociological point of contestation.

11. HANS LINDAHL, *AUTHORITY AND THE GLOBALISATION OF INCLUSION AND EXCLUSION* (2018).

12. See *id.* at 2 (“No global legal order is universal or universalisable because unification and pluralisation are the two faces of the single, ongoing process of setting the boundaries of legal orders, global or otherwise.”).

13. *Id.* at 1.

The response, therefore, to the objections of the pluralists and the triumphalists is fundamentally pragmatic. The concerns of both groups are correct, but there is no way to fully extricate oneself from such concerns. Any institutional design decision or procedural choice or judicial or legislative rule will always and necessarily be “jurispathic,” as Robert Cover would say,¹⁴ thereby choosing one law over another and striking a blow to pluralism. At the same time, any honest descriptive account of law must recognize that in the face of any assertion of law, even the most global and all-encompassing, pluralism is never defeated; what is legitimately law to one group will be illegitimate to others.

So, what to do in response to these two opposite critiques, both of which are accurate? My answer is to recognize the conundrum and therefore always to be self-conscious about one’s assertions of legitimacy or legality or one’s exercises of hegemonic power. This emphatically does not mean that one should never make such assertions; only that one should be aware of the conundrums that inevitably render such assertions problematic. This is what Lindahl calls “restrained collective self-assertion,”¹⁵ and it is likely the most persuasive way of understanding how authority works in a world where authority is only ever relative, not absolute.¹⁶

In what follows, I explore this conundrum of the global and the plural, using Lindahl’s analysis to illuminate the central challenges from pluralists and from internationalists, as well as the provisional answers that global legal pluralism provides to try to meet those challenges. Part I focuses on pluralist challenges to global theory. Part II turns to internationalist challenges to pluralism. And Part III develops the idea of restrained collective self-assertion and the self-conscious imposition of jurispathic power as the most effective provisional and imperfect response to both challenges.

I. THE PLURALIST CHALLENGE TO GLOBAL THEORY

As noted above, legal pluralism initially was a locally situated descriptive legal theory. Thus, for example, anthropologists studied particular social contexts and used the idea of legal pluralism to conceptualize the relationship between specific colonial and indigenous legal systems.¹⁷ Likewise, historians analyzed the numerous local sites of

14. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983) (describing judges as inevitably “people of violence” because their interpretations “kill” off competing normative assertions).

15. LINDAHL, *supra* note 11, at 2.

16. See generally ROUGHAN, *supra* note 9.

17. See, e.g., Leopold Pospisil, *Modern and Traditional Administration of Justice in New Guinea*, 19 J. LEGAL PLURALISM & UNOFFICIAL L. 93 (1981).

jurisdictional contestation during the age of empire.¹⁸ And political theorists analyzed Church/State relations, again in specific contexts.¹⁹ In these analyses, scholars generally viewed legal pluralism as simply a reality, neither good nor bad, neither desirable nor undesirable. Instead, they defined their task principally as an exercise in thick description: cataloging the inevitable hybridity that arises when two legal or quasi-legal systems occupy the same social space, as well as the resulting strategic interactions that occur among those navigating the multiple regimes.

As a descriptive enterprise, global legal pluralism is relatively uncontroversial. After all, even the most die-hard nation-state sovereigntist would likely acknowledge that sub-, supra-, or non-state normative systems do impose real constraints that have real impacts. More controversial is the idea that legal pluralism might be a *normatively desirable* approach to the design of legal systems and procedures. This normative question, as noted above, asks whether legal or governmental systems might sometimes affirmatively seek to create or preserve spaces for productive interaction among multiple, overlapping communities and legal systems by developing procedural mechanisms, institutions, and practices that aim to bring those communities and systems into dialogue rather than dictating norms hierarchically. Further, global legal pluralism suggests that such an approach might be normatively desirable regardless of context, making it potentially a globally generalizable theory.

Thus, while constitutions traditionally try to demarcate clear hierarchical lines of authority among different decision-makers, a more pluralist constitutional design might, instead, create increased opportunities for dialectical legal interactions. For example, an institution such as federalism, which allows for creative contestation both among states and between the federal government and the states as a whole, can be seen as opening space for dialogue.²⁰ Or a court’s practice of publishing dissenting

18. See, e.g., *LEGAL PLURALISM AND EMPIRES 1500-1850* (Lauren A. Benton & Richard J. Ross eds., 2013).

19. As Marc Galanter observed, the field of church and state is the “*locus classicus* of thinking about the multiplicity of normative orders.” Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 28 (1981); see Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741 (1988) (analyzing church-state relations in the United States from a pluralist perspective).

20. See, e.g., Robert Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 682 (1981) (arguing that, although it might seem perverse “to seek out a messy and indeterminate end to conflicts which may be tied neatly together by a single authoritative verdict,” we should “embrace” a system “that permits the tensions and conflicts of the social order” to be played out in the jurisdictional structure of the system). More recently, scholars emphasizing dynamic federalism have drawn on legal pluralism to argue for the creative possibilities inherent in

opinions can be seen as a mechanism that gives voice to contestation and dialogue, allowing the dissenting voice to be heard in the marketplace of ideas.²¹

Turning to the international and transnational realm, some who study international law fail to find real “law” because they are looking for hierarchically based commands backed by coercive power.²² In contrast, a pluralist approach understands that interactions among various tribunals and regulatory authorities are more likely to take on a dialectical quality that is neither the direct hierarchical review traditionally undertaken by appellate courts, nor simply the dialogue that often occurs under the doctrine of comity.²³

One example of a pluralist mechanism is the margin of appreciation doctrine deployed by the European Court of Human Rights (ECHR) in order to give play to local variation. The idea here is to strike a balance between deferring to national courts and legislators on the one hand, and maintaining “European supervision” that “empower[s the ECHR] to give the final ruling” on whether a challenged practice is compatible with the European Convention on Human Rights on the other.²⁴ Thus, the margin of appreciation allows domestic polities some room to maneuver in implementing ECHR decisions in order to accommodate local variation. Affording this sort of variable margin of appreciation usefully accommodates a limited range of pluralism. It does not permit domestic courts to ignore fully the supranational pronouncement (though domestic courts have sometimes asserted greater independence).²⁵ Nevertheless, it does allow space for local variation, particularly when the law is in transition or when no consensus exists among member states on a given issue. Moreover, by framing the inquiry as one of local consensus, the margin of appreciation doctrine disciplines the ECHR and forces it to move

federalism’s interactivity. See, e.g., Erin Ryan, *Federalism as Legal Pluralism*, in OXFORD RESEARCH HANDBOOK ON GLOBAL LEGAL PLURALISM (Paul Schiff Berman ed., forthcoming 2019).

21. Cf. James Boyd White, *Constituting a Culture of Argument: The Possibilities of American Law*, in WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 231 (1984) (describing the importance of law as a forum for argument).

22. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)).

23. See generally Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006).

24. Sunday Times v. United Kingdom, App. No. 6538/74, 2 Eur. H.R. Rep. 245, 276 (1979).

25. See Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 MOD. L. REV. 183, 196–97 (2008) (discussing the evolution of the European human rights regime while tracing the interaction of the European Court of Human Rights with domestic courts in the European Union); see also LISA CONANT, *JUSTICE CONTAINED: LAW AND POLITICS IN THE EUROPEAN UNION* 3 (2002) (discussing a similar dialectical dynamic between domestic courts and the European Court of Justice).

incrementally, pushing toward consensus without running too far ahead of it. Of course, the actual *decisions* reached under the margin of appreciation doctrine are inevitably subject to controversy, but as a *procedural mechanism* the doctrine accommodates pluralism in a meaningful way.

The International Criminal Court’s (ICC’s) complementarity principle is another example of a pluralist mechanism. Under this principle, the Court cannot prosecute someone unless the suspect’s home country is unwilling or unable to investigate.²⁶ This means that space is created for the local nation-state to pursue the prosecution, but the specter of possible ICC jurisdiction hovers in the background. Thus, as with the margin of appreciation doctrine, complementarity occupies a middle ground between a fully internationalist hierarchical approach on the one hand, and a fully statist approach on the other.

Indeed, if the idea of managing, without eliminating, pluralism is the lens, then projects such as the European Union itself become not a failure (as we often hear), but something closer to the ideal, at least in conception if not in every detail. Indeed, while universalists complain that Europe should have a stronger commitment to centralized solutions and nation-state sovereigntists complain that Belgian bureaucrats threaten state autonomy, a normative vision of legal pluralism suggests that the EU’s institutional apparatus has important benefits in its balance of both positions and its efforts to accommodate both universalism and sovereigntist territorialism at the same time.

This is only a small sampling of the many possible pluralist mechanisms and approaches that communities (both state and non-state) might adopt, and I have surveyed these mechanisms and many others in far more detail elsewhere.²⁷ For our purpose here, the important point is to see that this normative global legal pluralism is not strongly universalist in the sense of insisting on a single set of norms. Instead, it is simply suggesting a set of possible procedural values that should be considered, recognizing that even these procedural values might sometimes be over-ridden based on other possible values.

Yet, even these comparatively weak proceduralist values are undeniably a set of Habermasian dialogic values.²⁸ And given that these values are asserted as part of a global normative theory, albeit a proceduralist

26. Rome Statute of the International Criminal Court, art. 17, July 17, 1998, 2187 U.N.T.S. 90.

27. See, e.g., Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CALIF. L. REV. 1155 (2007).

28. See generally JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996).

one, for committed pluralists this normative global legal pluralism is overly liberal and not really pluralist at all.²⁹

I have argued elsewhere why I think my theory of normative global legal pluralism, while potentially consonant with liberalism, is nevertheless distinct from liberalism because it emphasizes participatory and dialogic values that are not as core to the liberal model.³⁰ But I cannot deny that it certainly does espouse a set of dialogic values. And this proceduralist version of pluralism is liberal to the following extent: what I am seeking are procedures, institutions, and practices that bring multiple norm-generating communities into greater dialogue with each other. For example, the margin of appreciation doctrine creates an iterative interactive process among communities that would not exist as strongly if the ECHR simply tried to impose an international norm hierarchically on the one hand, or fully deferred to local norms on the other. Likewise, a hybrid court or tribunal with members of multiple communities sitting next to each other will tend to create more dialogue among those communities in reaching an outcome. Or a choice-of-law doctrine that requires decisionmakers to look to norms other than those of their own community in order to find possible rules of decision will likely result in more thoughtful consideration of those alternative communities, regardless of the ultimate outcome of the case. In each of these circumstances, the goal is to make decisionmakers more restrained in their exercise of jurispathic power and more accommodating of difference. And of course, these same principles could be, and sometimes are, adopted by non-state communities in managing their interactions with others.

But it is obviously true that some communities don't even want to join the dialogue. Other communities wish to exclude certain segments of the population (e.g., women) from the conversation. Some might even question whether rational dialogue is what is needed to make decisions. For example, if a religious leader seeks merely to impose an asserted universal truth by fiat, there is little room for the conversation, deference, and accommodation that a more pluralist mechanism would hopefully engender. Accordingly, my proceduralist vision of pluralism contains a bias that favors inclusion, participation, and conversation, and some illiberal communities will reject it on that basis.

Thus, as some critics have pointed out, the sorts of procedural mechanisms, institutional designs, and discursive practices I advocate

29. See, e.g., Alexis Galán & Dennis Patterson, *The Limits of Normative Legal Pluralism: Review of Paul Schiff Berman, Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*, 11 INT'L J. CONST. L. 783, 793 (2013) (book review).

30. Paul Schiff Berman, *How Legal Pluralism Is and Is Not Distinct From Liberalism: A Reply to Alexis Galán & Dennis Patterson*, 11 INT'L J. CONST. L. 801 (2013).

require “a larger normative environment in which pluralism has to be negotiated.”³¹ This is true and, as noted above, that normative environment is one in which reasoned discourse among multiple worldviews is both accommodated and fostered as much as possible. Accordingly, there must at least be agreement among the different normative communities to participate in the common enterprise. If they refuse to participate then it seems to me there is little that can be done within the legal arena.

In my book, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*,³² I draw on theorist Chantal Mouffe’s distinction between “adversaries” and “enemies.”³³ Adversaries are willing to enter the same social space and contest substantive normative disagreements; enemies are unwilling even to engage. The goal of my procedural pluralism is to encourage as many normative communities as possible to become adversaries rather than enemies. I argue that a system that routinely squelches alternative voices is likely to create more enemies over time, whereas one that seeks to allow multiple voices to be heard and tries for accommodation as much as possible will be more successful at turning at least some of those enemies into adversaries. Again, if this simply means bringing more enemies into the ambit of a liberal legal order that seeks maximum accommodation and deference to plural norms from plural communities, then I am happy to embrace that form of pluralism (and that form of liberalism).

But some want legal pluralism to be something far more radical (and far more impractical). So, for example, in my book I make what I think is a relatively moderate and restrained argument that liberal communities might try to open limited space for Sharia courts to operate so long as those courts do not trench upon fundamental values of the liberal community.³⁴ And it should be noted that even that moderate and restrained version of the argument draws fire from critics across the political spectrum, from rights advocates worried about illiberal practices to nation-state sovereigntists worried about giving any authority at all to non-state communities. Yet Alexis Galán and Dennis Patterson, in an article critiquing my book,³⁵ want to push much farther than I do. They claim that it’s not really pluralism unless I go all the way and advocate that liberal communities allow Sharia courts to operate *regardless* of whether or not they violate fundamental

31. Galán & Patterson, *supra* note 29, at 798.

32. See BERMAN, *supra* note 3, at 145–46.

33. CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 13 (2000).

34. See BERMAN, *supra* note 3, at 225.

35. Galán & Patterson, *supra* note 29.

values of the liberal community.³⁶ This strikes me as absurd. Just because one embraces insights from legal pluralism, after all, does not mean that the values of pluralism must necessarily and always trump any other values a community might hold. It simply cannot be that legal pluralism is only a true normative position if it is pursued to the exclusion of all other values, interests, and commitments.

Galán and Patterson treat my balancing of the values of pluralism with other values as ambivalence. They correctly note that my book celebrates pluralism as a descriptive fact, that I appreciate the existence of multiple overlapping communities, and that I resist universalizing tendencies that reduce diversity. But they see all of that as inconsistent with my effort to encourage the creation of legal mechanisms to manage this pluralism. However, these positions are not inconsistent at all. Indeed, they are likely to be our only hope of addressing the reality of pluralism without either squelching alternative views on the one hand, or having no legal order at all, on the other.

I acknowledge that striking this balance is extraordinarily difficult and perhaps impossible to achieve fully. But that does not mean it is incoherent or analytically inconsistent to try. And most importantly my book simply argues that it is normatively desirable for communities to make the effort. Indeed, I am far less concerned with how individual cases are decided or how individual institutions or mechanisms are designed than I am in trying to ensure that whoever reaches those decisions considers the values of legal pluralism as part of the calculus. So, yes, legal pluralism gets subsumed within a broader set of values held by any given decisionmaker or community, but that does not mean that factoring in the values of pluralism does not create long-term changes in the way the decisionmaker or community tackles procedural or institutional design challenges.

Lindahl too recognizes the pluralist critique, but he is even more forthright in his response. Lindahl acknowledges that critics such as Galán and Patterson are correct to a certain degree, but he argues persuasively that it is *not possible* to create any truly pluralist normative order given that pluralism is premised on the possibility (or inevitability) of resistance to any normative order, however inclusive. According to Lindahl, even if we can speak of emergent global orders in the *plural*, no *single* global order could ever exist that would include without simultaneously excluding.³⁷ As such,

36. See *id.* at 797 (arguing that my version of pluralism “cannot constitute a serious normative position”).

37. See LINDAHL, *supra* note 11, at 1–3.

he provocatively asserts that necessarily “humanity is inside and outside global law.”³⁸

As a result, even if we could develop a “global order of legally binding and enforceable human rights,” that order would still simultaneously include and exclude because there would always be some who would remain outside that order, either refusing the categories of the global order or somehow operating in resistance to all legal orders.³⁹ According to Lindahl, “unification and pluralisation are the two faces of the single, ongoing process of setting the boundaries of legal orders, global or otherwise.”⁴⁰

Thus, as Lindahl cogently observes, there can be no such thing as normative global legal pluralism in a pure sense. As soon as any normative regime is articulated, it cannot be fully plural. Or in any event, if it is, then it will inevitably be global and plural simultaneously.

II. THE INTERNATIONALIST CHALLENGE TO PLURALIST THEORY

In the last section we saw that the *normative* project of global legal pluralism may inevitably and necessarily be too much of a global normative project to satisfy committed pluralists. But on the flip side, the *descriptive* project of global legal pluralism makes committed internationalists uneasy.

Legal pluralists, generally speaking, are unwilling to be confined by a single formalist definition of law because they recognize that any such definition is likely to derive from a particular subject position and therefore will accord certain social action the mantle of law while denying other social action the same respect. Indeed, for years, pluralists wrestled with trying to define law before effectively giving up the project as inevitably fraught and biased, privileging some instantiations of law over others.⁴¹ Accordingly, pluralists turned the focus to observing sociological fact: what is it that individuals and communities come to consider to be law over time? What pronouncements of decisionmakers do they defer to, what rules do they obey, and whose decisions are they willing to enforce? And what practices do they enter into that impact their practical sense of binding obligation?

Lindahl, to his credit, does attempt a definition of law, but it is a capacious one indeed. For him, law is “institutionalised and authoritatively mediated collective action.”⁴² This definition allows him to include a variety of “emergent” systems within his purview and to conceptualize the possible

38. *Id.* at 1.

39. *See id.* at 2.

40. *Id.*

41. *See* Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC’Y REV. 869, 869–75 (1988).

42. *See* LINDAHL, *supra* note 11, at 1.

creation of global law from below, born not of treaties and nation-states, but of more inchoate orders, such as the Basel Committee for Banking Supervision, the International Accounting Standards Board, the consumer-based Clean Clothes Campaign, international standard-setting bodies, the Codex Alimentarius, and even the law promulgated and imposed by online platforms such as eBay.⁴³

The problem with this capacious, non-essentialist vision of law, from the point of view of internationalists, is that they have spent decades trying to convince committed nation-state sovereigntists that international law is *superior* law that should act as an independent constraint on states. Then along come legal pluralists who claim that seemingly everything and anything is law and it is a free-for-all, and that law is followed or not followed as communities wish, and the only way to tell what is actually law is to watch and see what people treat as law. After all, if every instance of “institutionalised and authoritatively mediated collective action” gets to be called law, then there is no way to authoritatively determine which of those many legal regimes is superior to the others. Hans Kelsen would roll over in his grave!⁴⁴

Ironically, in some contexts the pluralist perspective on law is actually helpful in defending the importance of international law. For example, as mentioned previously, some international relations and formalist scholars make polemical arguments against the very existence of international law, based on the fact that it often does not have independent coercive power behind it. Thus, according to these scholars, international law is simply an epiphenomenon of state power: states follow international law when it is in their interest to do so, and they ignore it when it is not.⁴⁵

Against such assertions, legal pluralism offers an alternative way of understanding how law actually operates. From a pluralist perspective, law is not only that which coercively forces individuals (or states) to do things that they do not want to do. Indeed, pluralists argue, coercive power is not the only way that law can have an effect, either domestically or internationally. As Martha Finnemore has noted, “[s]ocially constructed rules, principles, norms of behavior, and shared beliefs may provide states, individuals, and other actors with understandings of what is important or valuable and what are effective and/or legitimate means of obtaining those valued goods.”⁴⁶ As a result, law has an impact not merely (or perhaps even

43. *See id.* at 2.

44. *See generally* HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., 1967) (1960).

45. *See* sources cited *supra* note 4.

46. MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* 15 (1996).

primarily) because it keeps us from doing what we want. Rather, law changes what we want in the first place.

Thus, law operates as much by influencing modes of thought as by determining conduct in any specific case.⁴⁷ It is a constitutive part of culture, shaping and determining social relations⁴⁸ and providing “a distinctive manner of imagining the real.”⁴⁹ For example, “[l]ong before we ever think about going to a courtroom, we encounter landlords and tenants, husbands and wives, barkeeps and hotel guests—roles that already embed a variety of juridical notions.”⁵⁰ Indeed, we cannot escape the categories and discourses that law supplies.⁵¹ These categories may include ideas of what is public and what is private, who is an employer and who is an employee, what precautions are “reasonable,” who has “rights,” and so on.⁵² In short, “it is just about impossible to describe any set of ‘basic’ social practices without describing the legal relations among the people involved—legal relations that don’t simply condition how the people relate to each other but to an important extent define the constitutive terms of the relationship”⁵³

In this vision of law, the fact that international legal norms do not have coercive power behind them is not determinative because coercive power is not the only way that law constrains. Rather, we imbibe legal norms and cognitive categories even when we are not consciously aware of the norms in question. We are persuaded by legal norms even when those norms are not literally enforceable. We act in accordance with law because doing so has become habitual, not because we seek to avoid sanction. We conceive of our interrelations with others in terms of law because our long-term interests are advanced by doing so, even when our short-term interest might

47. See sources cited *supra* note 10.

48. See, e.g., EWICK & SILBEY, *supra* note 10, at 41 (arguing that “law is a part of the cultural processes that actively contribute in the composition of social relations”).

49. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 173 (1983).

50. Austin Sarat & Jonathan Simon, *Beyond Legal Realism? Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3, 20 (2001).

51. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 105 (1984) (“[I]n actual historical societies, the law governing social relations—even when never invoked, alluded to, or even consciously much thought about—has been such a key element in the constitution of productive relations that it is difficult to see the value . . . of trying to describe those relations apart from law.”).

52. Indeed, according to Sarat and Kearns:

Perhaps the most stunning example of law’s constitutive powers is the willingness of persons to conceive of themselves as legal subjects, as the kind of beings the law implies they are—and needs them to be. Legal subjects think of themselves as competent, self-directing persons who, for example, enter bargained-for exchanges as free and equal agents.

Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in *LAW IN EVERYDAY LIFE* 21, 28 (Austin Sarat & Thomas R. Kearns eds., 1993).

53. Gordon, *supra* note 51, at 103.

seem to counsel otherwise. And the existence of a legal norm alters the constitutive terms of our relationships with others as well as the costs of noncompliance.

All of these factors may be overcome in some circumstances. Indeed, people sometimes violate domestic law just as states sometimes violate international law. But in neither case does that mean that the law in question has no significant constraining force. And only by thinking more broadly about changes in legal consciousness and the complicated social, political, and psychological factors that enter into the conceptualization of state interests can we begin to understand how international law operates.

Yet, even though legal pluralism provides a cogent set of arguments to defend the *efficacy* of international law, to international law triumphalists that is insufficient because legal pluralism has no means of supporting the *legitimacy* of international law as superior law. After all, if there are many normative communities in the world all asserting forms of jurisdiction, who gets to decide which assertions are permissible and which aren't? In short, who gets to decide who gets to decide?

To a legal pluralist, however, this is a nonsensical question. After all, let us assume that we could get most people to agree that a particular assertion of jurisdiction was legitimate, whatever that might mean. Inevitably there would be some community somewhere that would resist this jurisdictional claim. And *from that community's perspective* the assertion of jurisdiction would be illegitimate. This is what Lindahl means when he says that no legal order can include without excluding.

Of course, we are accustomed to thinking of jurisdictional assertions as the unique province of a sovereign entity. But jurisdiction is more appropriately understood as a site of contestation and engagement among multiple relative authorities. Indeed, the assertion of jurisdiction itself can open space for the articulation of norms that function as alternatives to, or even resistance to, sovereign power.

For example, in seventeenth-century England, common law courts began to issue writs of prohibition in order to prevent the rival Court of High Commission from hearing certain cases.⁵⁴ In response, some critics argued that the common law courts were overreaching and that the question of which court had proper jurisdiction to hear a case could only be resolved by the

54. See CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE* 295 (1956) (explaining how Sir Edward Coke attacked the Ecclesiastical High Commission through writs of prohibition); SIR EDWARD COKE, *THE TWELFTH PART OF THE REPORTS OF SIR EDWARD COKE, KT.* 42 (London, E. Nutt et al., 4th ed. 1738) (1655) (discussing the use of writs in *Nicholas Fuller's Case*).

king because the authority of all judges derived from him.⁵⁵ In *Prohibitions del Roy*, Lord Coke describes himself as having replied to such characterizations of the king’s authority:

[T]rue it was, that God had endowed his Majesty with excellent Science, and great Endowments of Nature; but his Majesty was not learned in the Laws of his Realm of England. . . . With which the King was greatly offended, and said, that then he should be under the Law, which was Treason to affirm, as he said; to which I said, that Bracton saith, *Quod Rex non debet esse sub homine, sed sub Deo et Lege* [that the King should not be under man, but under God and the Law].⁵⁶

Thus, Coke refused to place the king beyond or above the domain of law.

By challenging the king and affirming the jurisdiction of the common law courts, Coke asserted the primacy of law even over sovereign power. In doing so, however, he also stripped the courts of the very “institutional protection . . . that ordinarily stands behind” courts and enforces their orders.⁵⁷ After all, who is to enforce legal jurisdiction when the king stands in opposition? This story makes clear both that courts can exercise power separate from (and perhaps contrary to) the governing power of the state and that the exercise of such power is risky and always contingent on broader acceptance by communities (and coercive authorities) over time. Nevertheless, despite the risk, the rhetorical assertion of jurisdiction itself can have an important effect.⁵⁸ For example, Coke’s memorialization of this jurisdictional assertion in his treatise was undoubtedly part of the Enlightenment movement to limit the power of kings and assert a higher rule of law. Thus, one can see a direct line from Coke to Thomas Paine, who declared that, in the new United States of America, “law is [K]ing.”⁵⁹

It is, of course, a commonplace to say that courts lack their own enforcement power, making them dependent on the willingness of states and individuals to follow judicial orders. As discussed above, this observation is often used as an argument for the irrelevance of international law itself: because it is not state law, so the argument goes, it is subject to the realpolitik

55. See, e.g., BOWEN, *supra* note 54, at 63 (describing the debate as to who had authority to decide jurisdiction in *Prohibitions del Roy*, 77 Eng. Rep. 1342 (K.B. 1607)); see also BOWEN, *supra* note 54, at 303–04 (discussing the debate over the king’s “absolute power and authority” to decide legal disputes).

56. BOWEN, *supra* note 54, at 65.

57. Robert Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 190 (1985).

58. There is some evidence that Coke’s version of his actions is not accurate and that he actually capitulated to the king’s authority. See BOWEN, *supra* note 54, at 305–06 (observing that some historians have rejected Coke’s account, relying on other seventeenth-century evidence, which indicates that Coke actually threw himself on the mercy of the king). Even if this is so, however, the rhetorical assertion of jurisdiction in his treatise might still have persuasive value over time.

59. THOMAS PAINE, *Common Sense*, in THE COMPLETE WRITINGS OF THOMAS PAINE 1, 29 (Philip S. Foner ed., 1945) (1776).

demands of pure power and is perhaps not really law at all. Similarly, we might think the claims to jurisdictional authority by non-state communities are not really law because the power of these non-state communities might depend on the willingness of states to carve out zones of jurisdictional autonomy for such communities.

But it is important to recognize that neither of these examples is fundamentally different from how law always operates, even when articulated by nation-state authorities. Indeed, courts can only ever exercise authority to the extent that someone with coercive power chooses to carry out the legal judgments issued.

Thus, the essence of law is that it makes aspirational judgments about the future, the power of which depends on whether the judgments accurately reflect evolving norms of the communities that must choose to obey them. If this is so, then we might view extraterritorial lawmaking as substantially similar to lawmaking within territorial bounds. For example, if a French court issues a judgment against a U.S. corporation, it might be true that the court's command is only literally enforceable if an American authority will agree to enforce it,⁶⁰ but the same court's decision against the corporation's French subsidiary is similarly dependent on the enforcement power of a sovereign. After all, if the executive branch of the French government were to refuse to enforce the order against the subsidiary, that order would have no more force than the order against the American parent. Finally, regardless of whether a U.S. sovereign entity ever enforces the French court's order, the court might never need literal enforcement from a U.S. court. If the U.S. corporation wishes to continue commercial activity in France, the corporation may choose to comply "voluntarily" anyway.⁶¹

So, if the assertion of jurisdiction is always an assertion of community dominion, then all judicial decisions rely on both that particular community's acquiescence and the willingness of other entities to recognize, enforce, or comply with the jurisdictional assertion. In this vision, we come to understand that all jurisdictional assertions depend largely on the rhetorical force of their articulation of norms to entice allegiance. Jurisdiction is really "jurispersuasion," the power to speak law and try to convince others to follow that law over time.

60. See, e.g., *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1186 (N.D. Cal. 2001), *rev'd*, 433 F.3d 1199 (9th Cir. 2006) (refusing to enforce French court judgment ordering Yahoo! to take steps to block hate speech illegal in France from being viewed in France). For further discussion of the Yahoo! Case, as well as more recent, similar cases, see Paul Schiff Berman, *Yahoo! v. Licra, Private International Law, and the Deterritorialisation of Data*, in *GLOBAL PRIVATE INTERNATIONAL LAW: ADJUDICATION WITHOUT FRONTIERS* 393–405 (Watt et al. eds., 2019).

61. See Berman, *supra* note 60, at 395 (noting such voluntary compliance).

This should not really be such a radical idea. We can all think of examples where jurisdictional assertions and legal pronouncements are contested, resisted, subverted, disobeyed, and transformed over time. Likewise, no state or Empire has ever been able to govern absolutely with no resistance. And of course there are always and forever many places in the world where states have far less power than other legal and quasi-legal entities.

The key point is that in order to resolve a normative conflict there is no way to get outside of social context in order to play God and simply decree that one set of norms or one decision-maker is authoritative and the rest are not. Or perhaps another way to put it is that one can *try* to make such a decree, but there is no reason to believe that such a decree will be universally accepted. To the contrary, as soon as one makes such a decree, that too will be resisted, contested, and subverted. There is no end to the contestation. And that is perhaps the core descriptive insight of legal pluralism.

International law triumphalists may well object to this insight. And *as a political matter* I may personally agree that certain international norms should be followed by populations. And I certainly hope nation-states sufficiently imbibe these norms and that they seep into consciousness sufficiently that they will harden into the taken-for-granted sense of just “how things are.” For example, the idea of individual human rights may have become part of legal consciousness in that way. Certainly, people around the world are now far more likely to frame their claims in the language of rights than even a century ago.

But again, notice that we are back in the realm of politics and sociological reality. If a norm seeps into legal consciousness, then it functions effectively as law, whether it’s an international law norm, a nation-state norm, or a non-state norm. But as to abstract claims of legitimacy or superiority, legal pluralism recognizes that any such claims are only ever partial and contested. And if that serves to frustrate both nation-state sovereigntists and international law triumphalists, so be it. It is the world we actually live in. The sovereigntist models of legitimacy are merely distorted simplifications of reality.

III. THE PROVISIONAL COMPROMISE: RESTRAINED COLLECTIVE SELF-ASSERTION

If no normative theory can ever include without excluding and if all assertions of legal norms are always and forever subject to contestation, resistance, and subversion, then what is law to do? How can law effectively navigate among the pluralism that exists and that will never be tamed completely?

Lindahl's answer is what he terms restrained collective self-assertion. Instead of trying to solve jurisdictional conflict through ever greater universalism (which will always end up excluding anyway), Lindahl asks communities asserting legal norms to suspend "the (full) application of the law to protect the other (in ourselves) as other than us."⁶² What he means by this is not entirely clear, but he ultimately offers as examples many of the sorts of institutional designs, procedural mechanisms, and discursive practices that global legal pluralism has identified as possible strategies: margins of appreciation, complementarity, subsidiarity, zones of autonomy, hybrid participation agreements, reciprocal recognition, and so on.

As noted previously, I have discussed these and other mechanisms extensively elsewhere⁶³ and will not do so again here. But the key point is that all of them (and many more) can be understood as ways that legal, governmental, or quasi-governmental regulatory systems can seek to create or preserve spaces for productive interaction among multiple, overlapping communities and legal systems.

Significantly, deploying these pluralist procedural mechanisms, institutional designs, or discursive practices does not require a commitment to any overarching universal set of substantive values, although as discussed in Part I above they do perhaps require a commitment to the liberal value of dialogue across difference. Restrained collective self-assertion means only a pragmatic willingness to engage with other possible normative systems and potentially to restrain one's own jurispathic voice for the sake of forging more workable, longer-lasting relationships and harmony among multiple communities.

Significantly, *restrained* collective self-assertion does not mean *no* collective self-assertion. Sometimes, of course, such deference to the Other will not be possible; this proceduralist vision of legal pluralism only seeks to embed habitual practices in which deference is *considered* and *attempted*, not in which it is always *implemented*.

Restrained collective self-assertion seeks to, at least, draw the participants to the contestation into a shared social space. This approach builds on Ludwig Wittgenstein's idea that agreements are reached principally through participation in common forms of life, rather than through agreement on substance.⁶⁴ Or, as Mouffe put it, we need to transform "enemies"—who have no common symbolic space—into

62. LINDAHL, *supra* note 11, at 287.

63. Berman, *supra* note 27.

64. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 241 (G. E. M. Anscombe trans., 3d ed. 1967).

“adversaries.”⁶⁵ Adversaries, according to Mouffe, are “friendly enemies[:] . . . friends because they share a common symbolic space but also enemies because they want to organize this common symbolic space in a different way.”⁶⁶ Ideally, law—and particularly legal mechanisms that foster restraint in collective self-assertion—can function as the sort of common symbolic space that Mouffe envisions and can therefore play a constructive role in transforming enemies into adversaries.

Restrained collective self-assertion is *global* in the sense that it aims to force consideration of what is necessary to have a smoothly functioning trans-community legal order, what US Supreme Court Justice Harry Blackmun once called “the systemic value of reciprocal tolerance and goodwill.”⁶⁷ On the other hand, it is *pluralist* because it demands that the assertion of Self always be conscious of the Other that is potentially being excluded. Any assertion of jurisdiction and any legal decision is inevitably jurispathic: it “kills off” one interpretation as it asserts another.⁶⁸ Or, to put it in Lindahl’s terms it simultaneously includes and excludes. The key point is to make decision-makers self-conscious about their necessary jurispathic actions.⁶⁹

This global legal pluralist framework, therefore, aims simultaneously to celebrate both local variation and international order, recognizing the importance of preserving both multiple sites for contestation and an interlocking system of reciprocity and exchange. Of course, actually doing that in difficult cases is a Herculean and perhaps impossible task. Certainly, mutual agreement about contested normative issues is unlikely and possibly even undesirable. Thus, the challenge is to develop ways to seek mutual accommodation, while keeping at least some “play” in the joints so that diversity is respected as much as possible. Such play in the joints also allows for the jurisgenerative possibilities inherent in having multiple lawmaking communities and multiple norms.⁷⁰ Always, the focus is on trying to forge

65. CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* 13 (2000).

66. *Id.*

67. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part).

68. See Cover, *supra* note 14 and accompanying text.

69. See Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover (An Essay on Racial Segregation at Bob Jones University, Patrilineal Membership Rules, Veiling, and Jurisgenerative Practices)*, 17 *YALE J.L. & HUMAN.* 17, 25 (2005) (“[Cover] wanted the state’s actors . . . to be uncomfortable in their knowledge of their own power, respectful of the legitimacy of competing legal systems, and aware of the possibility that multiple meanings and divergent practices ought sometimes to be tolerated, even if painfully so.”).

70. See Seyla Benhabib, *Democratic Iterations: The Local, the National, and the Global*, in *ANOTHER COSMOPOLITANISM* 45, 49 (Robert Post ed., 2006) (discussing and defining “jurisgenerative processes”).

the Wittgensteinian sort of shared social space that Mouffe describes for transforming enemies into adversaries.

Taken together, these principles provide a set of normative criteria for evaluating the ways in which legal systems interact. In addition, the principles could inform a community (whether state-based or not) that wishes to design mechanisms, institutions, or practices for addressing pluralism. Of course, such criteria are not exclusive. For example, a procedure or practice that manages pluralism well but denies certain norms of fundamental justice might be deemed problematic, regardless of its embrace of pluralism. Thus, I do not say that embracing pluralism always overrides other concerns. After all, many legal and quasi-legal orders are repressive and profoundly illiberal, and their norms may be resisted on those grounds. Instead, the important point is simply that pluralist considerations should always at least be part of the design, inculcating habits of mind that promote deference and restraint. Accordingly, decision-makers should always ask: Are there other normative systems at play here? Should I restrain my jurispathic voice? Is there some other decision-maker who might more appropriately speak to this issue? Are there ways I could develop a hybrid decisional framework that brings more voices to the table? And how can I design ongoing practices, procedures, or institutional arrangements to constitutionally embed these inquiries?

CONCLUSION

As Lindahl recognizes, no global theory of law can ever truly be global; it will always exclude even as it includes. There will always be those who do not see themselves as within the community being asserted, and these outsiders will likely view the asserted community jurisdiction as illegitimate, no matter how “global” that community purports to be. Likewise, there is no way to stand outside of all social systems and somehow declare without objection that one set of norms is definitively more legitimate than others. Accordingly, the best we can do is to recognize the interaction of these various forms of “institutionalised and authoritatively mediated collective action.”

Thus, global legal pluralism is neither fully global nor fully pluralist. To the extent it embraces as a normative matter institutional designs, procedural mechanisms, and discursive practices to effectuate an overarching goal of fostering dialogue across difference, it is asserting a global procedural value of dialogue and therefore is not fully pluralist. And to the extent it refuses, as a descriptive matter, to anoint some legal assertions as necessarily hierarchically superior to others, it is not fully global and will always be subject to criticism from committed internationalists. The best

global legal pluralism can do is to occupy a middle ground: adopting as capacious a definition of law and authority as possible, while pushing for any collective self-assertion to be self-conscious and restrained, all in order to keep the dialogue alive.

Ultimately, we must recognize that communities assert law as part of a conversation that never ends; they wield authority as part of an endless Mobius strip of contestation, they make choices amid the pluralism, and those choices inevitably squelch some voices and honor others. It is the self-recognition of our own limitations as authorities that encourages us to act in a self-restrained manner and in deference to other perspectives and points-of-view, at least to the extent we can. And, at the end of the day, that is probably the best that law can ever do: foster dialogue across difference and inculcate habits of self-restraint in imposing norms.